

CASE NO. A09-1441

STATE OF MINNESOTA
IN COURT OF APPEALS

In the Matter of the Petition of Excelsior Energy Inc. and Its Wholly-Owned Subsidiary MEP-I, LLC for Approval of Terms and Conditions for the Sale of Power from Its Innovative Energy Project Using Clean Energy Technology Under Minn. Stat. § 216B.1694 and Determination that the Clean Energy Technology Is or Is Likely to Be a Least – Cost Alternative Under Minn Stat. § 216B.1693

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LEGAL ISSUE

Did Respondent Minnesota Public Utilities Commission (“MPUC”) err in finding that the Power Purchase Agreement (“proposed PPA”) presented by Excelsior Energy Inc. and its subsidiary MEP-I LLC (“Excelsior”) is not in the public interest and that Respondent Northern States Power Company (“NSP”) is not mandated by Minn. Stat. §§ 216B.1693 (Relator Add. 1) or 216B.1694 (Relator Add. 2) to purchase electricity from Excelsior?

Based on the voluminous record and correct application of the statutes, the MPUC correctly found that (i) the proposed PPA is not in the public interest, (ii) the proposed power plant is not likely to be a least-cost resource, and (iii) NSP is not mandated to purchase electricity from Excelsior or its facility.

Apposite Statutes, Rules, and Cases:

Minn. Stat. § 216B.1693 (Clean Energy Technology (“CET”) statute)

Minn. Stat. § 216B.1694 (Innovative Energy Technology (“IEP”) statute)

Central Tel. Co. v. Minn. Pub. Utils. Comm’n, 356 N.W.2d 696 (Minn. Ct. App. 1984)

Grueling v. Wells Fargo Home Mortgage, 690 N.W.2d 757 (Minn. Ct. App. 2005)

In the Matter of Excess Surplus Status of Blue Cross and Blue Shield of Minnesota, 624 N.W.2d 263 (Minn. 2001)

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Reserve Mining Co. v. Herbst, 256 N.W.2d 808 (Minn. 1977)

I. STATEMENT OF THE CASE AND FACTS

This case is about the MPUC's consideration of the public interest related to Excelsior's proposed PPA to sell electricity from its proposed 603 megawatt ("MW") coal-fired power plant project ("Mesaba Project") to NSP. The MPUC found that NSP is not mandated to purchase electricity from Excelsior and that the proposed PPA is contrary to the public interest. The MPUC's decisions¹ are based on proper consideration of the voluminous record, correct implementation of the IEP and CET statutes, and sound consideration of the public interest. The MPUC concluded that the statutes did not guarantee Excelsior's success but only provided incentives, which remained subject to public interest review, and that the proposed contract is contrary to the public interest.

On appeal, Excelsior maintains that the MPUC must accept the proposed PPA without fully considering the public interest. First, Excelsior asserts that because its proposed plant is exempted from a certificate of need, Excelsior is guaranteed a contract to sell electricity to NSP. Excelsior conflates the statutory construction permit exemption

¹ They are the: (1) August 30, 2007 Order Resolving Procedural Issues, Disapproving Power Purchase Agreement, Requiring Further Negotiations, and Resolving to Explore the Potential for a Statewide Market for Project Power Under Minn. Stat. § 216B.1694, Subd. 5 ("Phase 1 Order") (Relator Add. 31), adopting in part and modifying in part the April 12, 2007 Findings of Fact, Conclusions of Law, and Recommendation ("ALJ Phase 1 Report") (Relator Add. 78); (2) November 8, 2007 Order Denying Petitions for Reconsideration and other Post-Decision Relief and Reconsidering Order on Own Motion to Require Further Filings ("Phase 1 Reconsideration Order") (Relator Add. 57); (3) September 24, 2008 Order Resolving Procedural Issues, Denying Petition, and Modifying Negotiation Requirements ("Phase 2 Order") adopting with minor modifications the September 14, 2007 Findings of Fact, Conclusions of Law, and Recommendation ("ALJ Phase 2 Report"); and (4) July 7, 2009 Order Denying Motions and Denying Reconsideration ("Final Reconsideration Order") (Relator Add. 72).

into an electricity purchase mandate. The MPUC correctly recognized the distinction. Second, Excelsior asserts that the MPUC was precluded from considering the broad public interest, claiming the statutes narrowly confined the available criteria. Excelsior's constricted reading cannot withstand scrutiny and the MPUC correctly considered the "public interest" called for in the statutes. Minn. Stat. §§ 216B.1694, subd. 2(a)(7); 216B.1693(b). This public interest standard is neither narrow nor constricted. Third, Excelsior claims that the record to which it stipulated was deficient. This claim confuses the proper evidentiary standard on appeal, and disregards the record before the Court.

A. The Statutes

The IEP and CET statutes were passed in 2003. They create certain regulatory incentives that apply to an "innovative energy project." Minn. Stat. §§ 216B.1694, subd. 1 (defines "innovative energy project"²); 216B.1693 (defines "clean energy technology"³). These incentives are not unbounded. Some are implemented only after a "public interest" finding by the MPUC. *See* Minn. Stat. § 216B.1693(b) (2008) (CET statute standard is not "contrary to the public interest"); Minn. Stat. § 216B.1694, subd. 2(a)(7) (2008) (IEP statute standard is "public interest determination").

² An innovative energy project (1) "utiliz[es] coal as a primary fuel in a highly efficient combined-cycle configuration with significantly reduced" emissions; (2) is "capable of offering a long-term supply contract at a hedged, predictable cost"; and (3) is on the Iron Range. Minn. Stat. § 216B.1694, subd. 1 (2008).

³ "[C]lean energy technology' means a technology utilizing coal as a primary fuel in a highly efficient combined-cycle configuration with significantly reduced sulfur dioxide, nitrogen oxide, particulate, and mercury emissions from those of traditional technologies." Minn. Stat. § 216B.1693(c) (2008).

One of the incentives is that “[a]n innovative energy project ... is exempted from the requirements for a certificate of need under section 216B.243, for the generation facilities,” and associated infrastructure, but remains subject to environmental review and permitting. Minn. Stat. § 216B.1694, subd. 2(a)(1) (2008).⁴ Additional regulatory incentives in the IEP statute include legislative encouragement for Minnesota’s utilities to purchase the output from an innovative energy project, subject to MPUC public interest oversight. Minn. Stat. § 216B.1694, subd. 2(a)(5) (2008) (utilities to consider electricity from an innovative energy project, subject to MPUC review).

Section 216B.1694, subd. 2(a)(7) provides incentives for a transaction with NSP to purchase 450 MW of electricity. This provision states an innovative energy project:

[S]hall be entitled to enter into a contract with [NSP] to provide 450 megawatts of baseload capacity and energy under a long-term contract, subject to the approval of the terms and conditions of the contract by the commission. The commission may approve, disapprove, amend, or modify the contract in making its public interest determination, taking into consideration the project’s economic development benefits to the state; the use of abundant domestic fuel sources; the stability of the price of the output from the project; the project’s potential to contribute to a transition to hydrogen as a fuel source; and the emission reductions achieved compared to other solid fuel baseload technologies[.]

⁴ The certificate of need statute states: “No large energy facility shall be sited or constructed in Minnesota without the issuance of a certificate of need by the commission ... consistent with the criteria for assessment of need.” Minn. Stat. § 216B.243, subd. 2 (2008). It is a construction permit for the facility. *No PowerLine, Inc. v. Minn. Envt’l Quality Council*, 311 Minn. 330, 332 n.1, 250 N.W.2d 158, 159 n.1 (1976) (“[c]onstruction cannot begin unless the [MPUC] has issued a certificate of need”).

This incentive is contingent upon Excelsior entering into a “contract” with NSP, which is subject to “approval ... by the commission,” and the MPUC “making its public interest determination, taking into consideration” five additional factors. *Id.* (emphasis added).

B. The Project

Excelsior’s proposal was to construct two-603 MW coal-fired power plants utilizing Integrated-Gasification, Combined-Cycle (“IGCC”) technology. (Relator Add. 89-90.) IGCC is a new technology that reduces smokestack emissions to levels similar to other modern technologies. (Relator Add. 102.) Each power plant will cost about \$2.3 billion. (Exh. MCGP 5055 (Notice of Financial Award).)

While IGCC technology reduces some emissions, the technology remains a net-emitter and “has little advantage over the solid fuel baseload technologies likely to be deployed today.” (Relator Add. 53.) IGCC technology also contributes significant greenhouse gas (*e.g.* carbon dioxide (“CO₂”)) to the atmosphere. (Relator Add. 123 (“[t]he MPCA’s analysis establishes that carbon dioxide emissions from other technologies are expected to be lower than ... the Project”).) Excelsior’s proposal did not include the equipment or costs to mitigate greenhouse gas. (ALJ Phase 2 Report, p. 17.) It would require an additional \$1 billion per plant to do so. (Relator Add. 133, 45.)

Excelsior is owner of the Mesaba Project. Excelsior is not a public utility and is not subject to MPUC authority. Minn. Stat. § 216B.02, subd. 4; (Relator Add. 111-112). Excelsior holds exclusive right to any profits arising out of its project. (*See* Department’s January 5, 2007 Policy Statement, p. 3) (Filed January 10, 2007).)

C. The Proceeding

Excelsior approached NSP about purchasing electricity from one of its proposed power plants. The parties were unable to achieve a meeting of the minds necessary to form a contract. (Relator Add. 34.) Excelsior then sought to compel NSP to purchase the output from two power plants by unilaterally seeking MPUC “approval” of its proposed PPA, and seeking to compel NSP to purchase electricity from both power plants.⁵

The MPUC referred the matter to a contested case. At Excelsior’s request (Second Prehearing Order, ¶ 2), the Administrative Law Judge (“ALJ”) bifurcated the hearing. Phase 1 was to determine whether the Mesaba Project is an innovative energy project and whether the proposed PPA was in the public interest. Phase 2 was to determine whether NSP could be compelled to purchase 13% or more of its electricity from Excelsior.

Extensive discovery was conducted. More than 4,000 pages of evidence was admitted, including pre-filed testimony from 48 witnesses. Excelsior, NSP, Minnesota Power, the Minnesota Department of Commerce (“Department”), the MPCA, and others provided evidence. The parties had the opportunity to challenge expert qualifications, and cross-examine witnesses. Yet, Excelsior stipulated admissibility, waived cross-examination, and submitted the case on the stipulated record.⁶

⁵ Excelsior would require NSP to purchase 450 MW from “Mesaba Unit 1” under the IEP statute, plus an additional 153 MW under the CET statute. (Relator Add. 135.) “Mesaba Unit 2” was proposed to compel NSP to purchase 13% or more of NSP’s electricity under the CET statute. (Excelsior Petition, Sec. II, p. 13.) Excelsior assumed the two statutes were “additive” rather than overlapping. (See Relator Add. 91-92.) This issue was not decided below, (see ALJ Phase 2 Report, p. 19), or addressed here.

⁶ (See Relator Add. 93; see also ALJ Phase 2 Report, p. 24.)

The ALJ prepared reports for the MPUC. The MPUC considered the reports along with the entire record, heard oral argument, and issued its Orders. The MPUC found that the proposed Mesaba Project constitutes an “innovative energy project.” The MPUC further found that the proposed PPA is not in the public interest. The MPUC concluded that “the terms and conditions as to price impose excessive risks, and are likely to impose excessive costs, on Xcel and its ratepayers.” (Relator Add. 44.⁷) On July 7, 2009, the MPUC issued its Final Reconsideration Order. (Relator Add. 72.) This appeal followed.

II. STANDARD OF REVIEW

Excelsior brings this appeal by petition for writ of certiorari pursuant to Minn. Stat. §§ 216B.52 and 14.63. Minnesota Power cross appeals.⁸

Minn. Stat. § 14.69 establishes the standard of review. *See Minn. Pub. Interest Research Group v. N. States Power Co.*, 360 N.W.2d 654, 656 (Minn. Ct. App. 1985). The court may affirm, modify, reverse, or remand if the agency decision was: (a) in violation of constitutional provisions; (b) in excess of the statutory authority or jurisdiction; (c) made upon unlawful procedure; (d) affected by error of law; (e) unsupported by substantial evidence in the entire record; or (f) arbitrary or capricious.

⁷ The MPUC also found “the Mesaba Project is not, and is not likely to be, a least-cost technology and that it is therefore ineligible for an order under Minn. Stat. § 216B.1693 directing Xcel to buy 13% of its retail supplies from the project.” (Relator Add. 62.) Excelsior has not challenged the Phase 2 Order. The MPUC’s comparative cost decisions are thus binding upon Excelsior and are the law of the case as discussed below.

⁸ Minnesota Power’s cross appeal challenges this finding by arguing that the record established that (i) the proposal provides insufficient emissions improvements to satisfy the statute, and (ii) Excelsior is incapable of offering a “hedged and predictable” price.

Excelsior asserts that the MPUC's Phase 1 Order exceeded statutory authority, was arbitrary and capricious, and was unsupported by substantial record evidence. (Relator Br., pp. 17-20.) Excelsior fails to recognize, however, that this Court grants the MPUC broad latitude to implement its statutory charge. Far from impermissibly exercising its will, the MPUC applied its regulatory oversight under the circumstances and the record, adhering to the statutes and its "prior norms and decisions." *See Central Tel. Co. v. Minn. Pub. Utils. Comm'n*, 356 N.W.2d 696, 701 (Minn. Ct. App. 1984).

In reviewing the MPUC's legal conclusions and statutory application, the Court considers the matter de novo. *Minnegasco v. Minn. Pub. Utils. Comm'n*, 549 N.W.2d 904 (Minn. 1996). The Court will apply the same statutory construction principles used by the MPUC to review the MPUC orders. The MPUC's interpretation will be upheld unless it conflicts with the express statute or intention of the Legislature. *In the Matter of Univ. of Minn.*, 566 N.W.2d 98, 103 (Minn. Ct. App. 1997).

Agency decisions, like here, involving agency expertise, call for broad deference from the Court. *See St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*, 312 Minn. 250, 261, 251 N.W.2d 350, 357-58 (1977). The Minnesota Supreme Court reiterated this in *In re Request of Interstate Power Co. for Auth. to Change Rates*, 574 N.W.2d 408 (Minn. 1998). Courts should affirm the MPUC's decision "unless shown to be in excess of statutory authority or resulting in unjust, unreasonable, or discriminatory rates by clear and convincing evidence." *Id.* at 413 (quoting *St. Paul Area Chamber of Commerce*, 312 Minn. at 262, 251 N.W.2d at 358) (emphasis added); *In re Petition of N. States Power Co.*, 416 N.W.2d 719, 723 (Minn. 1987).

III. ARGUMENT

The MPUC made two fundamental decisions: (a) the proposed PPA is not in the public interest taking into consideration the five factors set forth in the IEP statute; and (b) Xcel Energy is not mandated to purchase electricity from the proposed Mesaba Project. On appeal, this Court likewise must answer two questions: (1) did the MPUC have the legal authority to make its decisions; and (2) does the record support them?

Excelsior's appeal essentially claims the statutes guaranteed success for its private project. First, Excelsior asserts the statutes mandate NSP to accept the proposed PPA, irrespective of the costs and risks to NSP or the public. *But see* Minn. Stat. § 645.17(5) ("the legislature intends to favor the public interest as against any private interest"). Second, Excelsior ignores plain statutory meaning by deeming the MPUC's "public interest" review was constrained. Third, Excelsior's argument fails to recognize the substantial record developed in this case, which formed the foundation for the decisions.

Based on that record, the MPUC found the potential benefits of IGCC technology are outweighed by the costs and risks of Excelsior's proposed PPA because:

- The proposed PPA pricing was unknown and subject to largely unbounded adjustments after approval, shifting unacceptable risk to NSP's ratepayers without adequate regulatory recourse. (Relator Add. 47.)
- Even at the nonbinding estimated cost, ratepayers would pay 30% excess, plus \$1 billion more for CO2 mitigation. (Relator Add. 45-46.)
- Unacceptable design, construction, operation, and fuel risks were shifted to ratepayers through pass-through mechanisms. (Relator Add. 45-47.)

A. MPUC Authority Under IEP Statute.

Excelsior reads the statutes as effectively mandating NSP and the MPUC to ensure project success. (*See Relator Br.*, pp. 7-10.) Excelsior's argument finds no support in the statutes and was properly rejected in the MPUC's orders. Rather than addressing the orders, which reflect the MPUC's sound analysis and proper application of the statutes, Excelsior instead suggests that the IEP statute meant something far different than the words on the page. Excelsior's argument (i) takes isolated Commissioner comments out of context as an excuse to ignore the orders; (ii) asserts public officials expect the project to succeed; and (iii) claims the MPUC misunderstood its role in facilitating Excelsior's private interest. This argument, however, cannot change the text or plain meaning of the statutes and does not provide a proper basis for Excelsior's claims.

1. Commissioner Comments

Excelsior repeatedly relies on individual Commissioner comments during deliberations to argue that the MPUC improperly applied the public interest standard. (*Relator Br.*, pp. 23-4, 28, 30-1, 45.) The analytical construct of this argument is misplaced and contradicted by well-settled law.

The MPUC speaks exclusively through written orders. *See* Minn. Stat. § 216B.33 (2004) (“[e]very order [or] finding issued or approved by the commission ... shall be in writing and filed in the office of the secretary of the commission”). Sound bites from deliberations do not attack or even inform the reasoned bases for the MPUC's orders. Citing isolated comments out of context is itself misleading. “Reading a transcript might give the court ideas of individual member's views, but one member's views may not

reflect the basis for the action of other members.” *Reserve Mining Co. v. Minn. Pollution Control Agency*, 364 N.W.2d 411, 415 (Minn. Ct. App. 1985); accord *MD/DC/DE Broadcasters Ass’n v. Fed. Commc’ns Comm’n*, 253 F.3d 732, 735 (D.C. Cir. 2001) (“collegial body, however; it speaks through its orders”), *cert. den.* 534 U.S. 1113 (2002).

That certain Commissioners expressed concern with the IEP and CET statutes or with the location of the Mesaba Project as part of their deliberative process does not evidence an arbitrary and capricious determination. See also *City of Frisco v. Texas Water Rights Comm’n*, 579 S.W.2d 66, 72 (Tex. App. 1979) (“the thought processes or motivations of an administrator are irrelevant in the judicial determination whether the agency order is reasonably sustained by appropriate findings and conclusions that have support in the evidence”). Excelsior purposefully selected quotations from two individual Commissioners (Koppendrayer and Reha) to use as its example of both proper and improper individual reasoning. (Relator Br., pp. 30-1, 45.) However, these quotations were taken out of context and show no more than the normal give and take of the deliberative process. Further, and most importantly, both of these Commissioners voted the same way and the written orders reflect both of their decisions. No conclusions can be drawn from the debate at oral argument. As required by statute, the MPUC’s Orders provide the only findings and decision, and is the only voice of the MPUC.

2. Public Official Statements

Excelsior placed great reliance below on the statements of certain legislators and public officials to suggest the statutes were intended to create a mandate on NSP. (See Phase 2 ALJ Report, pp. 26-27.) On appeal, Excelsior places great reliance on the

political process and the alleged underlying reason for the statutes. Excelsior's assertions of legislative intent or package deals in legislation (Relator Br., pp. 7-9) fail to overcome the plain statutory meaning as properly interpreted by the MPUC. It is improper to disregard the words of a statute under the guise of capturing its supposed spirit. Minn. Stat. § 645.16 (2008); *U.S. Jaycees v. McClure*, 305 N.W.2d 764, 765 (Minn. 1981).

Legislative intent is to be drawn from the words of the statute, not after-the-fact statements or a litigant's assertions about why the law was enacted. Post-enactment opinions of participants or observers is not competent evidence of what the Legislature intended. *In re State Farm Mut. Auto. Ins. Co.*, 392 N.W.2d 558, 568-69 (Minn. Ct. App. 1986); see *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978). In *Krueth v. Ind. Sch. Dist. No. 38*, 496 N.W.2d 829, 834 (Minn. Ct. App. 1993), this Court confirmed that even a bill's author cannot collaterally reinvent a statute. Such after-the-fact assertions reflect individual opinions, not legislative guidance. *Id.*

3. No Implied Powers

Excelsior incorrectly asserts that the MPUC exercised "implied" powers in applying the public interest requirements. (Realtor Br., pp. 45-47.) To the contrary, the statutes plainly give the MPUC plenary authority to determine the "public interest." Excelsior's own legal witness agreed that the IEP Statute gives the MPUC "plenary authority" over the proposed PPA. (Relator App. 32.)

Excelsior's misplaced reliance on *In the Matter of Qwest's Wholesale Service Quality Standards*, 702 N.W.2d 246 (Minn. 2005), is unavailing. The *Qwest* court determined that the MPUC did not have implied authority to order a self-executing

penalty scheme that went beyond the penalty provisions of statute. In the instant case, by contrast, the MPUC interpreted the explicit words of the statute that imparted jurisdiction to make “public interest” findings. The MPUC used only the authority expressly granted by those statutes. *See* Minn. Stat. § 216B.1694, subd. 2(a)(7) (2008) (“[t]he commission may approve, disapprove, amend, or modify the contract in making its public interest determination”). The MPUC merely followed the plain text of the statutes.

B. IEP Statute Properly Applied

Given that the MPUC properly exercised its authority under the IEP statute, this case boils down to a straightforward review of whether the MPUC correctly applied the statutes to the record facts at hand. Settled principles of statutory construction establish that it did.

1. Statutory Construction

The IEP statute is clear on its face as to what it requires and what it does not. The statute gives Excelsior – not NSP – the right to build, own and profit from the proposed Mesaba Project. NSP’s only involvement is as a voluntary electricity purchaser.⁹ The statute plainly means that after reaching a contract with NSP, that contract is subject to MPUC approval using public interest criteria, as supplemented by the statute’s five enumerated public interest factors. Minn. Stat. § 216B.1694, subd. 2(a)(7) (2008).

⁹ The IEP statute does not compel NSP to acquiesce to any contract Excelsior proffers. *See Power Res. Group, Inc. v. Pub. Util. Comm’n of Tex.*, 73 S.W.3d 354, 358-59 (Tex. App. 2002) (Congress did not intend statutory incentives to create risk-free environment requiring utility to accept contract under any circumstances).

The fact that the IEP statute explicitly provides that the MPUC has authority to review and then approve, disapprove, amend, or modify “the contract” perforce means the MPUC has broad latitude to consider all relevant circumstances in deciding what to do with it.¹⁰ Approval of a contract would, of course, create valuable regulatory incentives; it would encourage moving forward on a mutually-beneficial transaction in the “public interest” by reducing regulatory hurdles. But even with a contract, Excelsior would have still faced significant obstacles because of the high cost of its project.

The regulatory-approval incentive in no way guaranteed Excelsior’s success. “An enforceable right is created when [the legislature] mandates, rather than merely encourages a specified entitlement.” *Spielman v. Hildebrand*, 873 F.2d 1377, 1386 (10th Cir. 1989) (internal quotations and citations omitted). “[A] mandate is questionable [when a statute] was enacted to provide [] incentives...” *Id.* When an “[a]ct could plausibly be understood either as a mandate to regulate or as a series of incentives” the Supreme Court read provisions together to hold that the statute as whole was an incentive and not a mandate. *New York v. United States*, 505 U.S. 144, 170 (1992). Using this interpretative tool, the IEP statute must be read as a whole and Excelsior’s entitlement to seek MPUC approval of a “contract” is to be read in concert with the other provisions.

¹⁰ Just as clearly, the IEP statute contemplates that a contract exists for the MPUC to consider. Here, there never has been a “contract” between two mutually agreeing parties, but rather a unilateral demand by one party. *See Bowie v. La. Pub. Serv. Comm’n*, 627 So. 2d 164, 169 (La. 1993) (regulations infringing on utility right to contract must be strictly construed to apply only where warranted by the regulations’ language).

For example, one of the other incentive provisions of the IEP statute is the exempting of the Mesaba Project from the requirements of obtaining a “certificate of need.” This incentive is meant to facilitate the construction of the Mesaba Project by eliminating a regulatory permitting requirement. Minn. Stat. § 216B.1694, subd. 2(a)(1) (2008). This incentive is unmistakably a procedural exemption and is plainly not a mandate or guarantee of success of the Mesaba Project. The facility is still required to obtain all environmental permits. *Id.* Nowhere in the IEP statute does it state that the Mesaba Project “shall be built.” The certificate of need exemption neither creates a mandate nor expands the MPUC’s authority to force a contract on NSP. *See Maine Pub. Utils. Comm’n v. Fed. Energy Regulatory Comm’n*, 520 F.3d 464, 479 (D.C. Cir. 2008) (laws encouraging new energy supply does not enlarge jurisdiction).

If the legislature intended a mandate on NSP, it knew how to write one. Minn. Stat. §§ 216B.2423 (2008); 216B.2424 (2008). These statutes are instructive. In the Wind Power statute, the legislature mandated that NSP “must construct and operate, purchase, or contract to construct and operate” wind energy. Minn. Stat. § 216B.2423, subd. 1 (emphasis added), and subd. 3 (NSP required to develop and obtain approval of “standard form contract”). This statute is unambiguous. The Biomass statute contains similar language. Minn. Stat. § 216B.2424 (2008).

The Legislature knew how to impose a binding mandate on NSP but chose not to do so as the IEP statute contains nothing as definitive as “NSP must.” To the contrary, it contains public interest qualifiers on Excelsior’s incentives, bringing the analysis right

back to where it started – the MPUC is required to determine whether any contract entered into by the parties is in the public interest.

2. CET Statute by Contrast

The CET statute, from which Excelsior does not appeal, contains a conditional mandate on NSP that is dramatically different than the legislative language used in the IEP statute. Under the CET statute, NSP “shall supply” energy from clean energy technology. This is the type of “must” language the legislature uses in mandate statutes. And if the “likely to be least cost” standard is satisfied, “[e]lectric energy supplied [under the CET Statute] shall be supplied by [the Mesaba Project] unless the commission finds doing so contrary to the public interest.” Minn. Stat. § 216B.1693(b).¹¹

The IEP statute by contrast contains no such mandatory terms. Rather, the MPUC was to include the five additional considerations listed in the statute in its public interest determination. The MPUC took them into account insofar as it would have allowed them to outweigh its usual public interest determination if the MPUC had not found the proposed PPA to be in such derogation of the public interest. (Relator Add. 44 (“[w]hile the Commission has taken these five considerations into account – and has considered them very carefully – the contract’s pricing terms and conditions carry so many serious

¹¹ Had Excelsior proved its case in Phase 2, NSP would have been required to accept at least 2 percent of its supply under this statute if the MPUC had found the Mesaba Project “likely to be least cost” and doing so is “not contrary to the public interest.” But Excelsior did not prove its case and it has not appealed from the MPUC’s adverse ruling under the CET statute.

risks that the advantages of IGCC technology are not enough to counterbalance them, let alone to tip the scales in favor of contract approval”).)

3. PURPA Analogy

Congress imposed mandate language requiring utilities to purchase certain types of electricity under the Public Utilities Regulatory Policy Act of 1978 (“PURPA”). This law allows certain electricity sellers to compel utilities to purchase the output of their power plants. 16 U.S.C. § 284, *et. seq.* If a utility refused, PURPA provides that a “legally enforceable obligation” or mandate arises on the utility. 16 U.S.C. § 284a-3(m). In *Pub. Serv. Co. of Okla. v. State ex rel. Okla. Corp. Comm’n*, the court stated that:

the creation of a legally enforceable obligation is not governed by the common law of contracts. It is a concept created by federal and state statutes, regulations and administrative rules. It is clear from these sources that electric utilities need not be willing participants in the creation of a legally enforceable obligation. Rather, a utility’s obligation to purchase power is imposed by law.

115 P.3d 861, 872-73 (Okla. 2005) (citing *Snow Mountain Pine Co. v. Maudlin*, 734 P.2d 1366, 1370 (Or. 1987)).

This PURPA concept is notably absent from the IEP statute. Further, even PURPA’s “mandate” is not unconditional. *See e.g., Smith Cogeneration Mgmt., Inc. v. Corp. Comm’n*, 863 P.2d 1227, 1232 (Okla. 1993) (only a viable project can incur a legally enforceable obligation). In *Power Res. Group, Inc. v. Pub. Util. Comm’n of Texas*, the court recognized that even under the legally enforceable obligation concept, power plant owners are not entitled to impose unacceptable terms on an unwilling utility. 422 F.3d 231, 238 (5th Cir. 2005), *cert. denied*, 547 U.S. 1020 (2006). *See also, Armco*

Advanced Materials Corp. v. Pa. Pub. Util. Comm'n, 579 A.2d 1337 (Pa. Commw. Ct. 1990) (legally enforceable obligation arises only when the QF commits to delivering energy, not during “serious negotiations”); *Snow Mountain Pine Co. v. Maudlin*, 734 P.2d 1366, 1371 (Or. 1987); see *A.W. Brown Co. v. Idaho Power Co.*, 828 P.2d 841 (Idaho 1992); *Appeal of N.H. Pub. Util. Comm'n*, 539 A.2d 275 (N.H. 1988); *Mid-South Cogeneration, Inc. v. Tenn. Valley Auth.*, 926 F. Supp. 1327 (E.D. Tenn. 1996); *S. River Power Partners, L.P. v. Pa. Pub. Util. Comm'n*, 696 A.2d 926, 932 (Pa. Commw. Ct. 1997).

A pair of Oklahoma PURPA cases are instructive. In *Public Service Co. of Okla. v. State ex rel. Okla.*, the court found proposals must be viable and the terms proposed must be consistent with the statute. 115 P.3d at 872. It cannot be assumed that any proposal will comply and it cannot be assumed that a power plant will automatically be given a “legally enforceable obligation.” *Id.* In *Smith Cogeneration Mgmt., Inc. v. Corp. Comm'n*, 863 P.2d 1227 (Okla. 1993), the utility had no need for additional electricity. *Id.* at 1232. The court rejected the notion that the utility could be compelled to pay a higher price if it did not need the power: “[W]e find nothing in PURPA which entitled Smith to have avoided costs fixed for the life of the proposed power sales agreement” when no need for the electricity was shown. *Id.* at 1235. Thus, even PURPA does not provide a blanket mandate or license to compel unreasonable terms or to impose a “legally enforceable obligation” that goes beyond the specific statutory requirements.

C. The Public Interest Standard

Excelsior's claim that the MPUC's public interest inquiry was constrained and that the MPUC considered criteria beyond that authorized by the legislature has no legal merit. Excelsior's interpretation of the statutes ignores certain words, misreads others, and requires additional words that are not found in the statute. Statutory terms are to be construed according to their ordinary meaning and the decision maker must apply the plain meaning of the statute. Minn. Stat. § 645.16 (2008); *Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 736 (Minn. 2000). Agencies must construe statutes so that no provision is rendered superfluous. Minn. Stat. § 645.17 (2008); *Ginsberg v. Minn. Dep't of Jobs & Training*, 481 N.W.2d 138, 143 (Minn. Ct. App. 1992) (every term to be given meaning), *rev. denied* (Minn. Apr. 9, 1992).

1. IEP Public Interest Test

The legislature is presumed to understand the meaning of special terms it uses, such as "public interest" and "approval" in the public utility regulatory scheme.¹² The IEP statute uses these terms in significant ways that make the legislative intent clear. Any "contract" is "subject to the approval" of the MPUC. Minn. Stat. § 216B.1694, subd. 2(a)(7) (2008). Likewise the MPUC may "approve, disapprove, amend, or modify the contract in making its public interest determination, taking into consideration the" five additional factors. *Id.* Thus, the statute requires the MPUC to (i) review the

¹² See Minn. Stat. §§ 216B.01; 216B.045; 216B.16; 216B.162; 216B.1635; 216B.1636; 216B.1637; 216B.164; 216B.1675; 216B.1691; 216B.17; 216B.2422; 216B.2424; 216B.2425; 216B.243; 216B.37 (public interest review required in various contexts).

proposed PPA, (ii) “approve, disapprove” or modify it, (iii) applying the “public interest” standard taking into consideration five additional factors.¹³ The record is replete with evidence of the proper public interest standard. (*See* Relator Add. 44.)

Excelsior would have the Court read the IEP statute as limiting the public interest determination only to the five factors. (Relator Br., p. 44.) This interpretation would nullify the “public interest” concept included by the Legislature. If the Legislature had intended for the MPUC to apply only the five factors, it did not need to include “public interest determination.” It could have simply said: “in reviewing the contract, the commission shall consider only” the five factors. The legislature did not do so but left “public interest” and “approval” concepts intact. *See Vlahos v. R&I Constr.*, 676 N.W.2d 672, 681 (Minn. 2004) (courts may not rewrite statutes). Excelsior’s own witness supports a broad reading of “public interest” by characterizing the five factors, not as exclusive considerations, but rather as “modulating” the public interest determination. (Relator App. 32.) This is exactly what the MPUC did, modulating its public interest review by taking into consideration the five factors.

The Legislature has used the “taking into consideration” construction in other contexts. *See* Minn. Stat § 518.175, subds. 3(b)(2) and 3(b)(4) (2008) (“taking into consideration special needs of the child”; “taking into consideration the age and maturity

¹³ The CET statute lends credence to the interpretation that the legislature requires the MPUC to make its normal public interest determination. It requires the MPUC to make a public interest determination as to the supplying of energy by Excelsior pursuant to the CET statute. Minn. Stat. § 216B.1693(b) (2008).

of the child”); Minn. Stat. 253B.092 (2008) (applying the reasonable person standard, “taking into consideration” four factors); Minn. Stat. § 161.32 (2008) (“taking into consideration” several factors). In each case, the legislature requires broad review of the circumstances and is pointing out additional factors it wants emphasized.

2. Certificate of Need Exemption

Excelsior also claims that the MPUC erred by misapplying the statutory certificate of need exemption found in Minn. Stat. § 216B.1694, subd. 2(a)(1) to its public interest determination on the proposed PPA. This argument, however, conflates the statutory construction-permit exemption for the power plant, with the MPUC’s public interest analysis of whether NSP has a use for electricity from Excelsior.

Under the IEP statute, the legislature set forth the terms of the exemption under Minn. Stat. § 216B.1694, subd. 2 (a)(1) as follows:

An innovative energy project (a) is exempted from the requirements for a certificate of need under section 216B.243, for the generation facilities, and the transmission infrastructure associated with the generation facilities, but is subject to all applicable environmental review and permitting procedures of chapter 216E.

(Emphasis added). This provision plainly applies to the power plant itself and merely states that it is exempt from certain construction permitting requirements. The “innovative energy project” is defined in Minn. Stat. § 216B.1694, subd. 1 as “a proposed energy-generation facility” that satisfies the statutory criteria. (Emphasis added). It is the power plant itself, not Excelsior, the output, or a contract that is exempt. “[T]echnical words and phrases and such others as have acquired a special meaning ... are construed according to such special meaning...” Minn. Stat. § 645.08(1) (2008).

Separately, the IEP statute provides that Excelsior “shall be entitled to enter into a contract” subject to MPUC approval in light of the “public interest.” Minn. Stat. § 216B.1694, subd. 2(a)(7) (emphasis added). Once again, the meaning is plain – Excelsior has the opportunity to contract to sell electricity to NSP, subject to public interest review and MPUC approval. There is nothing in the statute that suggests the facility’s permit exemption limits the public interest review of the proposed PPA.

Further, Excelsior’s claim that the statute constrains the MPUC’s public interest consideration of the proposed PPA under subdivision 2(a)(7) is also unsupported. Excelsior maintains that it was error to consider the cost of electricity to NSP’s ratepayers when undertaking the public interest review of the proposed PPA. But both the IEP and CET statutes are clear that the MPUC is to consider the “public interest” in its determination. And the record is clear that in considering power purchase agreements, the MPUC routinely considers whether the purchasing utility has a use for the electricity being sold, along with many other factors. (Exh. DOC 3000, pp. 29-31 (Amit Direct).) Statutory terms are to be construed according to the ordinary meaning of the terms used and the decision maker must apply the plain meaning of the statute. Minn. Stat. § 645.16 (2008); *Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 736; (Minn. 2000).

The distinction between power plant permits and NSP’s electricity purchase is clear when the certificate of need statute is considered. Minn. Stat. § 216B.243, subd. 2 (2008) provides that “[n]o large energy facility shall be sited or constructed in Minnesota without the issuance of a certificate of need” by the MPUC. (Emphasis added). That statute focuses on the facility by requiring a complex one-year permitting process as a

prerequisite to construction. Eliminating that requirement and attendant delay, not just from the power plant but also from associated infrastructure, is a valuable incentive. That incentive further allows the proposed project to enter the market and compete with other power plants sooner and with much less bureaucracy by avoiding the permit.

By conflating the certificate of need exemption with the MPUC's public interest analysis, Excelsior essentially rewrites the IEP statute. Excelsior would have the IEP statute exempt the power plant from a certificate of need AND mandate any transaction Excelsior wants. Excelsior's interpretation requires words and concepts to be read into (and out of) the statute. The courts "will not supply words that the legislature either purposely omitted or inadvertently left out. Instead we apply the plain meaning of the words of the statute..." *Vlahos*, 676 N.W.2d at 681 (citation omitted).

D. Record Supports Decision

Ultimately, this case boils down to whether the MPUC had an adequate record to support its decisions. Excelsior argues that the cost analysis relied on by the MPUC was not "accurate, reliable, or complete" and that the cost evidence provided by Excelsior was never challenged as "inaccurate, unreliable, or incomplete." (Relator Br., p. 38.) This argument ignores the thorough record analysis upon which the MPUC's decisions were based as well as the legal effect of the unconditional stipulation.

1. Stipulated Record

Excelsior voluntarily agreed that all cost data, which it now claims lacks "foundation" (Relator Br., p. 36), was admissible for all purposes. The MPUC was not limited to use only Excelsior's evidence or only use the evidence for Excelsior's

purposes. *Mass v. Laursen*, 219 Minn. 461, 464, 18 N.W.2d 233, 235 (1945) (evidence, once admitted, is the common property of the cause and may be used all purposes). It is immaterial who sponsored what evidence. The cost comparisons were stipulated into the record and created valid alternatives for consideration. And Excelsior waived cross-examination of the witnesses it now criticizes. If Excelsior found the witnesses and evidence objectionable, it should have raised it below rather than stipulating.

The stipulation manifests the parties' intent that the agency's decision shall be based exclusively on the stipulated evidence. *Lannipen v. Union Ore Co.*, 224 Minn. 395, 407-408, 29 N.W.2d 8, 17 (1947). Accordingly, the stipulation cannot be contradicted by other evidence. *Id.* at 408, 29 N.W.2d at 17. The stipulation is binding on the parties and the Court. *Id.* at 407, 29 N.W.2d at 17. *See also Abendroth v. Nat'l Farmers Union Prop. & Cas. Co.*, 363 N.W.2d 785, 787 (Minn. Ct. App. 1985) (stipulation is permissible and binding on the court). A stipulation cannot be unilaterally withdrawn. *Gran v. City of St. Paul*, 274 Minn. 220, 223, 143 N.W.2d 246, 249 (1966).

Excelsior's stipulation prohibits its attacks on the stipulated evidence, because Excelsior acquiesced to consideration of that evidence. *See State v. Nelson*, 562 N.W.2d 324, 327 (Minn. Ct. App. 1997) (defendant waived objections on appeal by stipulating to the admission of evidence); *State v. Cavegn*, 294 N.W.2d 717, 723-24 (Minn. 1980), (defendant waived right to question admission after stipulating admissibility); *United States v. Aptt*, 354 F.3d 1269, 1280 (10th Cir. 2004) ("admission of a stipulated exhibit is not error..., even if it would not be admissible in the absence of such a stipulation").

The MPUC's actions in Phase 2 are noteworthy and provide guidance. Significantly, Excelsior has not challenged the MPUC's Phase 2 Orders and Excelsior has not raised any issues arising out of the MPUC's interpretation of the CET statute.¹⁴ In Phase 2, the MPUC found that the proposed Mesaba Project compared poorly to other plants. (ALJ Phase 2 Report, pp. 13-18.) This is substantially the same type of cost comparisons that Excelsior's brief attacks relating to the IEP statute.¹⁵ Yet, Excelsior does not challenge the Phase 2 Orders, including the cost comparisons. This means that for purposes of the CET statute, Excelsior has acquiesced in substantially the same cost comparisons that it claims were deficient when considering the proposed PPA. Excelsior should not be allowed to stipulate to the evidence, try to disavow it on appeal of Phase 1, while acquiescing to it in Phase 2. See *Greuling*, 690 N.W.2d at 762 (discussing waiver).

2. Weight of Evidence on Cost

Aside from Excelsior's evidentiary commitments and inconsistent approach on appeal, the record fully supports the MPUC's analysis and decision. Costs of electricity

¹⁴ Issues not raised on appeal are waived and cannot be considered. *Townsend v. State*, 723 N.W.2d 14,20 (Minn. 2006) ("...any issues not raised in his direct appeals would be deemed waived."); *Grueling v. Wells Fargo Home Mortgage*, 690 N.W.2d 757, 762 (Minn. Ct. App. 2005). By foregoing appeal of these issues, Excelsior should be barred from raising them on appeal, *Matter of Welfare of M.D.O.*, 462 N.W.2d 370, 379 (Minn. 1990), and the MPUC's rulings on the CET statute are the "law of the case." *State v. Sletten*, 664 N.W.2d 870, 874-5 (Minn. Ct. App. 2003) ("law of the case" prevented reexamination of court's earlier decision involving same legislative authority)).

¹⁵ In addition to waiving factual arguments, Excelsior waived any challenge under the CET statute itself, including the legal conclusion that the statute expires prior to Excelsior's ability to deliver power under that statute. Minn. Stat. § 216B.1693(d); (Relator Add. 65).

under the proposed PPA would be at least 30% higher than alternatives, with an additional \$1 billion tacked on for carbon mitigation. (Relator Add. 45-47; 132-133.)

The Department provided considerable comparative data that was unobjected-to and unimpeached that fully support the MPUC's conclusion. (Relator Add. 46.) The Department provided foundation for that data. (Exh. DOC 3000, p. 22 (Amit Direct) (Big Stone II costs); *id.*, p. 27 (Comanche 3 costs); *id.*, p. 28 (Sherco 4 costs).) Dr. Amit also used environmental costs proffered by Excelsior in its cost analysis. (*Id.*, p. 27 (“[t]o account for emissions costs, I used the emissions from the Excelsior initial filing as a reasonable proxy”).) Further, Excelsior had the opportunity to counter Dr. Amit's testimony and did so. (*See generally*, Exh. EE 1189 (Wolk Rebuttal).)

The MPUC weighed and balanced ALL of the evidence and assessed its relative weight. Courts “require the agency decision-maker to weigh all of the evidence presented and come to an independent decision ... the agency decision-maker owes no deference to any party in an administrative proceeding...” *In the Matter of Excess Surplus Status of Blue Cross and Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). The MPUC's summary easily satisfies this standard:

First, the Department's cost figures have a broader factual foundation than Fluor's. Fluor's cost comparisons are based on a single, hypothetical supercritical plant, while the Department's cost comparisons are based on three actual supercritical plants in different stages of construction or design by Minnesota utilities. Second, the Department's cost figures reflect a broader range and greater depth of expertise than Excelsior's. While Fluor's expertise as a construction company and consulting firm is significant and probative, the combined expertise of six Minnesota utilities engaged in the design and construction of supercritical plants is more probative. (Relator Add. 46.)

That Excelsior does not agree with how the MPUC weighed the competing evidence does not constitute reversible error. Minnesota courts “defer to an agency’s conclusions regarding conflicts in testimony, the weight given to expert testimony and the inferences to be drawn from testimony.” *Blue Cross*, 624 N.W.2d at 278 (citing *Quinn Distrib. Co. v. Quast Transfer, Inc.*, 288 Minn. 442, 449, 181 N.W.2d 696, 700 (1970)). The MPUC’s analysis was precisely the type of weighing authorized by the courts. Agency action must be based on “objective criteria applied to the facts and circumstances of the record at hand” and must “explain on what evidence it is relying and how that evidence connects rationally with its choice of action.” *Carter v. Olmsted County Hous. and Redev. Auth.*, 574 N.W.2d 725, 729-30 (Minn. Ct. App. 1998). The Commission enjoys “a presumption of correctness, and deference should be shown by courts to the agencies’ expertise and their special knowledge in the field of their technical training, education, and experience.” *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977).¹⁶

3. Alternate Grounds for MPUC Decision

In reaching its decision, the MPUC used the following analytical construct for considering the attributes of the proposed PPA. A PPA is in the public interest if:

¹⁶ Where it is plain from the decision that contrary evidence was considered but rejected, the decision will stand. *See Susnik v. Oliver Iron Mining Co.*, 205 Minn. 325, 331, 286 N.W. 249, 252 (1939); *Application of Lecy*, 304 N.W.2d 894, 899 (Minn. 1981) (fact finder not required to discuss all arguments).

1. The ratepayers are appropriately protected from the operational risks associated with the PPA;
2. The ratepayers are appropriately protected from the financial risks of the PPA; and
3. The purchase price to be paid for the electric energy and capacity is reasonable, when considered in combination with other socioeconomic factors that may be beneficial.

(Relator Add. 45-49; *see* Exh. DOC 3000, p. 8 (Amit. Direct).) As described above, factor three – purchase price of energy – has been the prime focus of Excelsior’s appeal arguments. In fact, Excelsior focuses on this issue to the virtual exclusion of all others.

The MPUC, however, stated several independent bases for its public interest finding, any one of which was fatal to the proposal. Thus, even if the Court is inclined to give Excelsior’s cost data greater weight than did the MPUC, it would be at most harmless error as the proposed PPA was contrary to the public interest in many other ways. *Sollar v. Sollar*, 176 Minn. 225, 225, 222 N.W. 926, 927 (1929) (per curiam) (“[w]here independent findings of fact, decisive of the case, are sustained and must stand, it is immaterial whether or not some other finding is sustained by the evidence”).

a. Pass Through Provisions

The evidence showed that typically the power plant owner – Excelsior – is responsible for the completion of the project on time and on budget. (Relator Add. 128.) As the owner, Excelsior is in the best position to manage cost-overrun and schedule risks through practices that will spread the risk (*Id.*), and Excelsior – not NSP or its ratepayers – holds the profit motive and should carry the corresponding risks.

The proposed PPA shifts many of these risks to NSP and its ratepayers in several important ways, which singly and in the aggregate render the proposed PPA contrary to the public interest, as found by the MPUC. First, the “capacity price” of the contract, which accounts for a large majority of the cost, is subject to change based on the final construction cost calculation. (Relator Add. 129.) This final construction cost is unknown and unknowable today and for many months after the MPUC approval. Setting that rate is not “subject to any requirement for competitive bidding, price caps, or any prudence review by Xcel Energy, the Commission or any other entity.” (*Id.*) While that rate will be set prior to construction, it will be set after the MPUC acts, leaving the MPUC with inadequate ability to address price increases that will occur.

During the proceeding, it became clear that Excelsior’s cost pass-through was a big problem. Excelsior offered a “conditional limited power to review” that did not mitigate the pass-through risk and was largely ineffective. (*Id.*) The “flow through” nature was preserved and this modest concession failed to allow review of “the reasonableness of cost increases” or “provide any meaningful ratepayer protection from the risk of increases.”

Normally, independent power producers like Excelsior offer power purchase contracts under which they assume the risks of plant design and construction. Here, the terms and conditions of the proposed contract shift nearly all those risks to Xcel and its ratepayers, by requiring payment of the full costs associated with engineering, procurement, and plant construction, subject to after-the-fact, broad-brush review by the Commission.

(Relator Add. 49.) This unchallenged finding independently justified the MPUC’s decision. The record supports this conclusion and contradicts Excelsior’s assertions that

the proposed PPA can be seen as a “fixed price” (*id.*) or places risk on Excelsior for the project’s success or failure. (*Id.*) And the record supports the conclusion that “the proposed contract does not even provide second-best protections, such as price ceilings, competitive bidding, or regularly scheduled prudence-review conferences.” (*Id.*)

b. Time Value of Money

The proposed PPA shifted nearly all risk of inflation and interest rate increases to NSP and its ratepayers, forming another basis for the MPUC’s decision. The original, non-binding, estimates were based on 2005 numbers, to be updated – at NSP’s risk. The record established that power generation sector costs escalated more than inflation after 2005, understating the price tag of Mesaba Unit 1. (*See Relator Add. 129.*)

The proposed PPA also fully shifted financing costs to NSP and its ratepayers by shifting interest rate adjustments. The MPUC correctly concluded that “it is neither reasonable nor consistent with industry norms to place the bulk of risks of financing this project on ratepayers.” (*Relator Add. 49; see Relator Add. 126-130 (cited evidence).*)¹⁷

On a related issue, normally power purchase agreements contain provisions that call for the owner – Excelsior – to provide a security fund to cover costs of defaults and to fund replacement power obligations if electricity is not delivered according to the contractual requirements. (*Relator Add. 128.*) The record established a \$71 million security fund was called for under the circumstances. Yet, the security offered by

¹⁷ The MPUC noted that late in the proceeding Excelsior made suggestions to mitigate some of the fundamental problems. (*Relator Add. 48-49.*) None of these proposals were developed on the record and were not subject to inquiry or analysis. The MPUC correctly did not rely on them and Excelsior does not press them here.

Excelsior was a small fraction of this amount. Excelsior maintained that a large security fund would merely increase the already-high price of electricity. (Exh. EE 1043, p. 11 (Osteraas Surrebuttal).) If security normal, then the absence of meaningful security creates an artificially low price comparison, thereby justifying the MPUC's decision.

c. Fuel Cost

Substantial evidence was taken on the cost of fuel that Excelsior would incur in operating its power plant. Fuel cost is a major cost component for any power plant and ensuring that fuel costs are incurred and managed prudently is a very important consideration in assessing the public interest. (Relator Add. 126.) But under the proposed PPA, "all fuel costs are passed through to Xcel, which essentially means that all risks of imprudent fuel purchasing practices are assumed by ratepayers." (Relator Add. 47.) This finding is essentially unchallenged by Excelsior on appeal and is supported by the detailed evidence of Karen Hyde. (Exh. XE-2005, p. 17 (Hyde Direct).)

d. O&M Pass Through

Operations and maintenance ("O&M") of power plants can be a significant cost driver and during the extended term of a 20+ year contract, managing these costs can be a major endeavor. It is, therefore, important to ensure that the party responsible for O&M has the incentive to keep costs as low as possible. But in this case, the proposed PPA created a pass through mechanism that allowed the O&M price factor to be adjusted every five years. "This risk allocation is unreasonable because such open-ended provisions lack any financial incentive or discipline ... and do not protect Xcel Energy's ratepayers from inappropriate expenditures." (Relator Add. 128.) Most importantly,

passing through O&M costs does not protect NSP's ratepayers from the operational risks of the PPA. Excelsior makes no mention of this shortcoming in its brief.

4. Not Likely to be Least Cost

In its Phase 1 Order, the MPUC concluded that since the proposed PPA does not meet the public interest standard, "it is impossible to find the Mesaba Project a least cost resource under Minn. Stat. § 216B.1693...." (Relator Add. 38.) The MPUC deferred all remaining consideration of the CET statute for Phase 2. In Phase 2, the MPUC reviewed the CET statute and concluded the Mesaba Project is not likely to be least cost.

The Commission concurs with the Administrative Law Judge's findings and conclusions that the Mesaba Project is not, and is not likely to be, a least-cost technology and that it is therefore ineligible for an order under Minn. Stat. § 216B.1693 directing Xcel to buy 13% of its retail supplies from the project.

(Relator Add. 62.) Excelsior does not challenge this conclusion on appeal.

In Phase 2, MPUC conducted a thorough review of the record evidence, concluding that the Mesaba Project is not a least cost resource. This analysis included: (i) comparison of the costs of the Mesaba Project against two other possible coal plants, Big Stone II and Sherco 4 (ALJ Phase 2 Report, pp. 13-4); (ii) analysis of the costs of the Mesaba project against the possible rise in natural gas prices which may occur due to recent legislative enactments (*Id.*, at p. 15); (iii) analysis of the cost of the Mesaba project when the cost savings of reduced particulate emissions are included (*Id.*, at p. 16); and (iv) the impact of carbon mitigation on the Mesaba Project's costs (*Id.*). This analysis persuaded the ALJ or the MPUC to find Excelsior's proposal is not likely be lost cost.

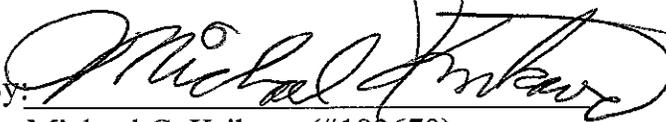
IV. CONCLUSION

For all the foregoing reasons, NSP respectfully requests the Court of Appeals affirm the MPUC's Orders in their entirety.

Dated: October 30, 2009

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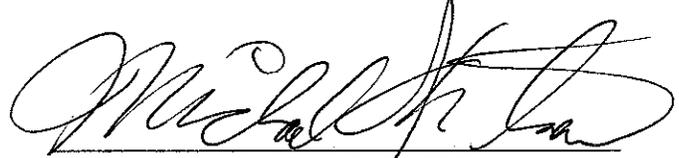
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondents certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 9,082 words, excluding the Table of Contents, Table of Authorities, and Appendix.

DATED: October 30, 2009



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